Bail Slip

The Appellant/ Accused No.4 Viz. Vijayan @ Jayapandian was directed to be released on bail in and by the order of this Court dated 31.7.2007 and made in Crl.M.P.No.1/2007 in C.A.No.626/2007.

The Appellant/ accused No.A2 viz Ramesh was directed to be released on bail in and by the order of this Court dated 13.8.2007 and made in Crl.M.P.No.1/2007 in C.a.No.689/2007.

The Appellant/ accused No.A3 Mariammal and accused A5 Arul were directed to be released on bail in and by the order of this Court dated 13.8.2007 and made in Crl.M.P.No.1/2007 in C.A.N0.692/2007

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 06.11.2007

CORAM:

THE HONOURABLE MR.JUSTICE D.MURUGESAN
and
THE HONOURABLE MR.JUSTICE K.N.BASHA

Referred Trial No.4 of 2007
Criminal Appeal Nos.626 of 2007,
657, 689 and 692 of 2007

Selvam .. Prisoner (Accused No.1) in R.T.No.4/07 and Appellant/A-1 in Crl.A. No.657/2007

Vijayan @ Jayapandian .. Appellant/A-4 in Crl.A. No.626/2007

Ramesh .. Appellant/A-2 in Crl.A. No.689/2007

Mariammal
Arul .. Appellants/A-3 & A-5 in Crl.A.No.692/2007

Vs.

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

State rep. by
Inspector of Police,
Chidambaram Town Police Station,
Chidambaram,
Cuddalore District.
(Crime No.262 of 1999) .. Respondent/Complainant
in all these appeals

R.T.4/07:- Trial referred by the Additional District Sessions Judge of the Court of Sessions of the Chidambaram Division at Chidambaram (Fast Track Court I) for confirmation of the sentence of death passed upon the said prisoner in sessions case No.323 of the Calender for 2005 on 29.6.2007.

Prayer : Criminal Appeals filed under Section 374(2) of the Code of Criminal Procedure against the judgment of conviction and sentence passed by the learned Additional District and Sessions Judge, (Fast Track Court No.I), Chidambaram, dated29.06.2007 in S.C.No.323 of 2005.

| | |
|---|---|
| Prisoner in RT 4/07 and For Appellants/A-1, A-3 & A-5 in Crl.A.Nos.657 & 692/2007 | : Mr.S.Ashok Kumar, SC for M/s.A.Sasidharan |
| For Appellant/A-2 in Crl.A.No.689/2007 | : Mr.R.Sethuvarayar |
| For Appellant/A-4 in Crl.A.No.626/2007 | : Mr.K.V.Sridharan |
| For Respondent in all these appeals | : Mr.C.T.Selvam Addl.Public Prosecutor |

J U D G M E N T

K.N.BASHA, J.

A-1, Selvam, the appellant in Crl.A.No.657 of 2007, A-2, Ramesh, the appellant in Crl.A.No.689 of 2007, A-3 and A-5, Mariammal and Arul, the appellants in Crl.A.No.692 of 2007 and A-4, Vijayan @ Jayapandian, the appellant in Crl.A.No.626 of 2007 have preferred these appeals challenging their conviction and sentence passed by the learned Additional District and Sessions Judge, Fast Track Court No.I, Chidambaram, in S.C.No.323 of 2005 dated 29.06.2007 as they have been tried, convicted and sentenced in the following manner :

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

| Accused | Charge u/s | Conviction | Sentence |
|---|---|---|---|
| A-1 to A-5 | 120(B) I.P.C. | Guilty | A-1 death sentence, A-2 to A-5 – Life Imprisonment with Rs.1000/-, i/d 1 year R.I. |
| A-1 to A-5 | 147 I.P.C. | A-1 to A-4 guilty | A-1 to A-4 – 2 years R.I. |
| A-1 | 148 I.P.C. | A-1 guilty | A-1 – 3 years R.I. |
| A-1 to A-5 | 341 r/w 149 I.P.C. | A-1 to A-4 guilty<br><br>A-5 not guilty | A-1 to A-4 – 3 months S.I. ; |
| A-1 to A-5 | 302 r/w 149 | A-1 to A-5 guilty | A-1 death sentence ; A-2 to A-5 – life sentence with Rs.1000/- each, i/d 1 year R.I. |
| A-1 to A-5 | 201 r/w 149 | A-1 to A-4 guilty | A-1 – 5 years R.I. ; A-2 to A-4 5 years R.I. with Rs.1000/- each, i/d 3 months R.I. |

There are originally 8 accused have been charge sheeted. One of the accused, viz., Kaliaperumal died before the commencement of the trial and the two other accused, viz., Veeramani @ Veera and Guru @ Gurunathan @ Sivagurunathan @ Mahesh were absconding.

2. The occurrence in this case is shown to have taken place on 02.06.1999 at 4.00 p.m. in pursuance of the conspiracy hatched by A-1 to A-5 to kill the deceased Paramanantham, a Head Constable, as A-1 and the absconding accused Veeramani @ Veera armed with deadly weapon, viz., iron pipes and while the deceased, Paramanantham, came in his scooter bearing Registration No.TN F 5785 taking the absconding accused Guru @ Gurunathan @ Sivagurunathan @ Mahesh in his scooter, A-1 and A-2 intercepted the deceased and prevented him to proceed further and the absconding accused Veeramani @ Veera saying that the deceased is not allowing them to sell the arrack and beat the deceased on his head with iron pipe and while the deceased got down from the scooter and attempted to run away from the scene, A-2 and the absconding accused Guru @ Gurunathan @ Sivagurunathan @ Mahesh caught hold of the deceased and again the absconding accused Veeramani @ Veera beat the deceased with the iron pipe on the back side of his head twice and the blows fell on the two hands of the deceased. A-1 beat the deceased on the back side of his head twice with the iron pipe and beat once on the left shoulder and the deceased fell down unconscious. The deceased/accused, Kaliaperumal and A-3 instigated the other accused to kill the deceased. After confirming that the deceased died A-1 asked Guru @ Gurunathan @ Sivagurunathan @ Mahesh to bring the auto

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

of A-4 and the deceased/accused, Kaliaperumal and A-3 brought one gunny bag and A-1 also further strangulated the deceased with the coconut coir and the deceased/accused, Kaliaperumal and A-3 put the body of the deceased in the gunny bag and tied the same and A-1 took the body of the deceased in his scooter and put the same into the haystack in his garden and thereafter, A-1 and the absconding accused Guru @ Gurunathan @ Sivagurunathan @ Mahesh took the body and buried the same in a nearby 'Kalam' of the field by digging a pit and they have also buried the gunny bag in the pit itself and the accused also thrown away the iron pipes and coconut coir on the backside of the Velikaruvanthope with a view to screen the offence and further they have hidden the TVS 50, spade and iron pipes after cleaning the same with the water in the hut of one Arumugam and the bloodstained clothes were hidden by the deceased/ accused, Kaliyaperumal, in the house of A-5.

3. The prosecution, in order to bring home the charges against the accused examined as many as 39 witnesses, viz., P.Ws.1 to 39, filed Exs.P.1 to P.51 besides marking M.Os.1 to 25.

4. The facts of the case, as projected by the prosecution during trial, are as follows :

I. Motive :

It is the case of the prosecution that the accused persons were involved in selling illicit arrack and the deceased, Paramanantham, who happened to be the Head Constable attached to the Town Police Station, Chidambaram, has taken action against the said accused persons and therefore, the accused, being aggrieved, conspired to kill the deceased who is standing as an obstacle to do their illicit arrack business.

II. Missing of the deceased :

The deceased, Paramanantham, was residing with his family members at the police quarters at Parangipettai. P.W.1 is the wife of the deceased, P.W.2 is the brother of P.W.1 and P.W.3 is the brother of the deceased. The deceased left the house on 02.06.1999 in the morning saying to his wife that he is going to attend his duty and he would return back to his home in the night. It is stated by P.W.1 that on the same day i.e. on 02.06.1999 at 9.00 p.m., one constable came and enquired her that whether the deceased returned back and for that, P.W.1 replied that the deceased not returned back to the home. P.W.1 was expecting the deceased during night-time and as the deceased not returned even till 03.06.1999, she went to Chidambaram Police Station and enquired the Writer and the Sub Inspector of Police about her husband's whereabouts. They informed that the deceased has not come. Thereafter, she went to her daughter, Chithradevi's house at Cuddalore and the deceased was not found even there. Again, she went to the Chidambaram Town

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

Police Station in the evening and enquired the constable and the Sub Inspector of Police and told them that she was frightened, as her husband was not found.

III. First Information Report :

P.W.1 gave a report, Ex.P.1 to P.W.36, Sub Inspector of Police, Chidambaram Police Station, and P.W.36 registered the First Information Report in Crime No.262 of 1999 for man-missing on 03.06.1999 at 6.00 p.m.

IV. Continuous search of the deceased by P.W.1 :

P.W.1 again searched for the deceased and also informed P.W.2, her brother about the same. She once again went to the Chidambaram Police Station and she was informed by one constable that her husband, the deceased, had gone to the railway track near Meethikudi Railway Station. Again, she searched for the deceased with her brother P.W.2 and enquired the persons from the said locality. Two-three persons informed her that the deceased was taken by one Guru @ Gurunathan @ Sivagurunathan @ Mahesh, the absconding accused. They have also informed that Veeramani @ Veera, another absconding accused and A-1, Selvam, and one Ravi were also chatting and proceeding with the deceased. They have also told P.W.1 that they are frightened that they would be killed, if they further disclose anything. Thereafter, she went to the Police Station and informed P.W.39, Inspector of Police, about the information received by her on 05.06.1999.

V. First Alteration of the First Information Report:

On the basis of the further statement recorded by P.W.39, Inspector of Police, from P.W.1, the offence was altered for the offence under Section 147, 148, 342, 325 and 364 I.P.C. Ex.P.38 is the altered First Information Report. He sent the altered First Information Report to the Magistrate Court on 07.06.1999.

VI. Investigation :

P.W.39, the Inspector of Police, took up investigation on 03.06.1999 from the Sub Inspector of Police in this case. As already stated, he recorded further statement of P.W.1 on 05.06.1999 and altered the First Information Report for the offence, as stated above. He went to the scene of occurrence and prepared the Observation Mahazar, Ex.P.6 and the Rough Sketch, Ex.P.39. He also recovered the scooter bearing Registration No.TNF 5785, M.O.21, under Ex.P.40 near the scene of occurrence. He also recovered the bloodstains from the bumper removed from the Feat Car bearing Registration No.MTR 4971 under Ex.P.41. Feat Car is marked as M.O.22, which was recovered under the mahazar Ex.P.42. He

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

examined P.Ws.1, 2, 4 to 9 and others and recorded their statements.

Arrest of A-2 : On 07.06.1999 at 4.00 p.m., on information P.W.39 arrested A-2, Ramesh, and in pursuance of the admissible portion of his confession under Ex.P.7, he recovered the Auto, M.O.7, in front of the house of A-5 under Ex.P.8. He examined some more witnesses and recorded their statements. Thereafter, he remanded the accused for judicial custody.

Arrest of the absconding accused Guru @ Gurunathan @ Sivagurunathan @ Mahesh and discovery of the body of the deceased : On 08.06.1999, he arrested the absconding accused Guru @ Gurunathan @ Sivagurunathan @ Mahesh at Chidambaram Railway Station in the presence of witnesses. In pursuance of the admissible portion of his confessions under Ex.P.44, the burial place of the body of the deceased was discovered and he summoned the Tahsildar, P.W.31, as per the requisition, Ex.P.45 and also summoned the police photographer. Thereafter, P.W.31, came to that place and the body of the deceased was exhumed from that place which was identified by the absconding accused Guru @ Gurunathan @ Sivagurunathan @ Mahesh, P.W.1/wife of the deceased, P.W.2/brother of P.W.1 and P.W.3/ brother of the deceased.

VII. Second alteration of the First Information Report :

In pursuance of the arrest of A-2 and the absconding accused Guru @ Gurunathan @ Sivagurunathan @ Mahesh, P.W.39 altered the offence to one under Sections 147, 148, 342, 302 and 204 I.P.C. Ex.P.43 is the altered First Information Report and he sent the same to the Magistrate Court.

VIII. Continuation of investigation by P.W.39 :

From the burial place, P.W.39 prepared the Observation Mahazar, Ex.P.13 and the Rough Sketch, Ex.P.46. He also recovered bloodstained earth, M.O.14, sample earth, M.O.15 and bloodstained gunny bag, M.O.5 under Ex.P.14 from the burial place in the presence of witnesses. Once again, he examined P.Ws.1, 2, 3 and others and recorded their statements.

Inquest : P.W.31, after exhuming the body of the deceased held inquest on the dead body of the deceased and examined P.W.1 and recorded her statement under Ex.P.2, Ex.P.3 statement from P.W.3 and Ex.P.4 statement from P.W.3. Ex.P.26 is the inquest report.

IX. Post-Mortem :

On 08.06.1999, as per the request of the Tahsildar, P.W.31, the Doctor, P.W.29 and the Doctor, P.W.30, conducted post-mortem on the dead body of the deceased. They found the following injuries :

WEB COPY
https://hcservices.ecourts.gov.in/hcservices/

External Injuries :

(1) A lacerated wound on the middle of the occipital region 12 X 1 X 1 cm pale in colour. Oblique in nature.

(2) A lacerated wound on the left parietal region 5 X 1 X 1 cm pale.

(3) Haemotomo on the left side of the occipital region 2 X 1 X 1 cm.

Internal Examination :

All organs in position.

Chest : Symmetrical. Ribs : intact. Lungs : weight 280 gms. Congested with region of decomposition. Heart : Pale, Empty, weight 200 gm. All organs in decomposition. Liver : weight 800 gms. Pale. Spleen : weight 250 gms. Pale. Kidney : Each weight 250 gms, pale. Stomach : Distended with gas. Intestine : distended with gas. External genitalia : Intact.

Skull bones, membranes : intact. Brain : Liquefied, Greyish in colour.

Internal Injuries :

(1) The upper 1/3 of left ulna fractured.

(2) The middle of left radius is fractured.

(3) The left shoulder is anteriorly dislocated.

Ex.P.22 is the Post-Mortem Notes Paper and Ex.P.23 is the Post-Mortem Report. The Doctor is of the opinion that the deceased died due to head injury and shock. Ex.P.24 is the chemical examination report and Ex.P.25 is the report in respect of Hyoid bone received by the Doctors.

X. Continuation of investigation by P.W.39 :

P.W.39, the Inspector of Police, arrested the deceased/accused, Kailaperumal, at 4.00 p.m. on 08.06.1999 near Chidambaram Bus stand and thereafter, remanded the accused to judicial custody through the Court. He also recovered the clothes as produced by the Head Constable under Form 95. On 09.06.1999, he gave a request to the Judicial Magistrate No.I, Chidambaram, to record the statement from the absconding accused, Guru @ Gurunathan @ Sivagurunathan @ Mahesh under Section 164 of Cr.P.C. as he expressed his desire to give such statement.

XI. Recording the judicial confession of the absconding accused Guru @ Gurunathan @ Sivagurunathan @ Mahesh by P.W.38, the Judicial Magistrate :

P.W.38, the Judicial Magistrate No.I, Chidambaram, received the request made by the Investigating Officer dated 09.06.1999 under Ex.P.33, to record the statement of the absconding accused Guru @ Gurunathan @ Sivagurunathan @ Mahesh under Section 164 of

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

Cr.P.C. and by following the procedure contemplated by giving sufficient time, summoned the said absconding accused Guru @ Gurunathan @ Sivagurunathan @ Mahesh and recorded the statement under Section 164 of Cr.P.C. Ex.P.34 is the request made by the learned Judicial Magistrate to produce the said accused before the Court. Ex.P.35 is the confession statement recorded from the accused Guru @ Gurunathan @ Sivagurunathan @ Mahesh.

Recording the statement under Section 164 of Cr.P.C. from the eye-witnesses : The Judicial Magistrate, P.W.38, received the request from the investigating officer to examine the eye-witnesses, P.Ws.17, 18, 19 and 33 but only P.Ws.17 and 33 were produced before the Court for recording the statements under Section 164 of Cr.P.C. and accordingly, P.W.38, recorded the statement under Section 164 of Cr.P.C. from the eye-witnesses, P.Ws.17, and 33 on 20.07.1999 under Exs.P.5 and 37.

XII. Continuation of investigation by P.W.39 :

On 11.06.1999 at 6.00 a.m, P.W.39, arrested the absconding accused Veeramani @ Veera near Thirupapuliyur Railway Station in their presence of witnesses. In pursuance of the admissible portion of his confession, P.W.39, recovered spade, M.O.12, TVS 50 bearing registration No.TN 31 6072, M.O.13 under Ex.P.12. On the same day, i.e., on 11.06.1999 at 10.00 a.m., he arrested A-1 at the residence of A-5 at Pondicherry. In pursuance of the admissible of his confession under Ex.P.9, he recovered bloodstained iron pipe and coconut coir/M.O.23 under Ex.P.11. He arrested A-5 also on the same day and recovered the shirt, lungi of the absconding accused Veeramani @ Veera as well as A-1 on the basis of the confession of A-5. Thereafter, he remanded all the accused for judicial custody. He sent the requisition under Ex.P.47 for sending the material objects for chemical examination. He also received the chemical examination report, Ex.P.49, Serologist Report, Ex.P.50 and he has made arrangements to get the superimposition of the deceased by sending the skull. He examined some more witnesses and also received the photographs and negatives, M.Os.16 to 20 and M.O.25 series. After completing the investigation, he filed the charge sheet against the accused on 25.09.1999 for the offence under Sections 147, 148, 341, 302, 201, 212 and 120(b) r/w 149 I.P.C.

5. When the accused were questioned under Section 313 of Cr.P.C., in respect of the incriminating circumstances and materials appearing against them, all the accused denied each and every circumstance put to them as false and contrary to the facts and they have stated that they have been falsely implicated in the case. They have not chosen to examine any witnesses and to mark any documents on their side.

6. Mr.S.Ashok Kumar, learned senior counsel appearing for A-1,

WEB COPY
https://hcservices.ecourts.gov.in/hcservices/

A-3 and A-5 contended that the prosecution has miserably failed to prove its case against the accused beyond reasonable doubt. It is submitted by the learned senior counsel that the eye-witnesses, P.Ws.17, 18, 19 and 33 turned hostile and they have not supported the prosecution case. It is submitted that therefore, the prosecution is left with no other material to implicate the accused in this case. It is submitted by the learned senior counsel that the only piece of evidence placed reliance by the prosecution is the alleged judicial confession recorded from the absconding accused Guru @ Gurunathan @ Sivagurunathan @ Mahesh under Ex.P.35 by the learned Judicial Magistrate, P.W.38. It is contended by the learned senior counsel that such piece of evidence could not be placed reliance by the prosecution, as the said absconding accused was not tried along with the present accused persons in this case. The prosecution also cannot place reliance on the alleged statements recorded under Section 164 of Cr.P.C. from the eye-witness, viz., P.Ws.17 and 33, by the learned Judicial Magistrate, P.W.38, as both P.Ws.17 and 33 turned hostile and and the prosecution has not elicited any question in respect of their Section 164 statement, but the defence, as far as P.W.17 is concerned elicited an answer from P.W.17 to the effect that he has given a statement to the Magistrate only at the instance of the police. Therefore, it is submitted by the learned senior counsel that there is absolutely no legal evidence adduced by the prosecution to implicate the accused in this case.

7. Mr.R.Sethuvaryar, learned counsel for A-2 and Mr.K.V.Sridharan, learned counsel for A-4 re-iterated the arguments as advanced by the learned senior counsel for A-1, A-3 and A-5. Mr.K.V.Sridharan, learned counsel for the appellant/A-4, further contended that the learned trial Judge has committed a serious error of law in placing reliance on the alleged judicial confession, Ex.P.35 recorded from the absconding accused Guru @ Gurunathan @ Sivagurunathan @ Mahesh which cannot be used against the present accused persons in this case and it is further submitted by the learned counsel that the learned trial Judge has equally committed an error of law in placing reliance on the statements recorded from the eye-witnesses, P.Ws.17 and 33 under Exs.P.5 and 37 respectively by the learned Magistrate as both the said statements Exs.P.5 and 37 not put to P.W.17 and 33 by the prosecution.

WEB COPY

8. We have heard Mr.C.T.Selvam, learned Additional Public Prosecutor, on the submissions made by the learned senior counsel for the appellants and other learned counsel for the appellants.

9. We have carefully considered the rival contentions put forward by either side and also thoroughly scrutinized the entire evidence available on record.

10.1. The prosecution mainly placed reliance on the evidence

https://hcservices.ecourts.gov.in/hcservices/

of P.Ws.1 to 11. P.W.1 is the wife of the deceased. P.W.2 is the brother-in-law of the deceased and brother of P.W.1. P.W.3 is the brother of the deceased and they have examined to speak about the missing of the deceased and searching for the deceased and they have informed by some persons that the deceased was last scene with the absconding accused Guru @ Gurunathan @ Sivagurunathan @ Mahesh and one Veeramani @ Veera and A-1 were proceeding and talking with the deceased and the said absconding accused Guru @ Gurunathan @ Sivagurunathan @ Mahesh. P.W.2 further added in his evidence that the absconding accused Guru @ Gurunathan @ Sivagurunathan @ Mahesh was selling arrack and the deceased taken him in his scooter and at that time, absconding accused Veeramani @ Veera and A-1 intercepted the deceased and asked the deceased to leave the absconding accused Guru @ Gurunathan @ Sivagurunathan @ Mahesh and thereafter, the said accused Veeramani @ Veera beat the deceased and dragged him. P.W.3, brother of the deceased, has spoken only about identifying the body of the deceased.

10.2. The prosecution examined P.Ws.4, 5 and 7 to 10 to speak about the absconding accused Guru @ Gurunathan @ Sivagurunathan @ Mahesh and another absconding accused Veeramani @ Veera and A-1 were involved in selling illicit arrack. P.W.4 stated that he has seen the deceased along with the absconding accused Guru @ Gurunathan @ Sivagurunathan @ Mahesh and the said absconding accused informing the deceased that he was selling arrack for A-1, A-5 and the absconding accused Veeramani @ Veera and thereafter, the deceased taken the said absconding accused in his scooter to the house of A-1 and the absconding accused Veeramani @ Veera. P.W.4 is the only witness corroborated the versions of P.Ws.1 and 2 to the effect that some of the persons informed them that they have seen the deceased has taken the absconding accused Guru @ Gurunathan @ Sivagurunathan @ Mahesh in his scooter and A-1 and the another absconding accused Veeramani @ Veera also seen with the deceased. But P.W.4 has turned hostile and not supported the prosecution case.

10.3. P.Ws.5, 7 to 10, who have examined by the prosecution to speak about the absconding accused Veeramani @ Veera, A-1 and A-5 were involved in selling illicit arrack, also turned hostile and not supported the prosecution case.

10.4. P.W.11, who has been examined by the prosecution to speak about the conspiracy by the accused, viz., A-1, A-5 and the absconding accused Veeramani @ Veera to kill the police officials if they interfere with their business of selling illicit arrack as they were standing as obstacles for their business. But even this witness turned hostile.

10.5. The prosecution also examined P.Ws.17, 18, 19 and 33 as eye-witnesses to speak about the occurrence proper. But the fact remains even these eye-witnesses turned hostile and they have not

WEB COPY
https://hcservices.ecourts.gov.in/hcservices/

supported the prosecution case.

11. It is well settled that the evidence of a hostile witness cannot be rejected in toto and any portion either in favour of the prosecution or in favour of the defence can be placed reliance. But in this case, all the above said hostile witnesses have completely turned hostile and there is absolutely no portion in their evidence available either in favour of the prosecution or in favour of the accused.

12. Therefore, now, the prosecution left with the only piece, viz., alleged judicial confession, Ex.P.35, of the absconding accused Guru @ Gurunathan @ Sivagurunathan @ Mahesh recorded by P.W.38, the Judicial Magistrate No.I, Chidambaram. It is to be borne in mind that the said absconding accused was not jointly tried along with the accused persons in this case as he was absconding continuously. P.W.38, the Judicial Magistrate also examined P.Ws.17 and 33, eye-witnesses under Section 164 of Cr.P.C. and their statements were marked as Exs.P.5 and 37 respectively. The learned trial Judge mainly placed reliance on the judicial confession, Ex.P.35 of the absconding accused Guru @ Gurunathan @ Sivagurunathan @ Mahesh and the 164 statement of P.Ws.17 and 33 which were marked as Exs.P.5 and 37.

13. The main question arises for our consideration is whether the above said pieces of evidence adduced by the prosecution amounts to a legal evidence and whether the same could be placed reliance for convicting the accused.

14. Before proceeding to consider the above said main question involved in this matter, let us analyse the other materials available on record.

15. It is the case of the prosecution that the accused conspired to kill the deceased, a Head Constable, as the police officials were interfering with their business of selling illicit arrack. The witnesses, viz., P.Ws.4, 5 and 7 to 10, who have examined to speak about the involvement of the accused in illicit arrack sale, have turned hostile. The investigating agency also not produced any materials viz., any case records to show the involvement of the any of the accused in the sale of illicit arrack. Therefore, we have no hesitation to hold that the prosecution has miserably failed even to prove the motive in this case.

16. As already stated, apart from recording the statements under Section 164 of Cr.P.C of the absconding accused Guru @ Gurunathan @ Sivagurunathan @ Mahesh under Ex.P.35, the learned Judicial Magistrate, P.W.38, has also recorded the statement under Section 164 of Cr.P.C. from the eye-witnesses, P.Ws.17 and 33. It

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

is relevant to refer the legal position in respect of the evidentiary value of the witness from whom the statement under Section 164 of Cr.P.C. was obtained. The Hon'ble Supreme Court in Balak Ram V. State of U.P. (1974 SCC (Cri.) 837 has held as follows :

> "It would be wrong to find fault with the Investigating Officer merely because he got the statements of witnesses recorded under Section 164. Nor can the evidence of a witness be discarded for the mere reason that his statement was recorded under Section 164. But the evidence of witnesses whose statements are recorded under Section 164 must be approached with caution. Such witnesses feel tied to their previous statements given on oath and have but a theoretical freedom to depart from the earlier version. A prosecution for perjury could be the price of that freedom. It is, of course, open to the Court to accept the evidence of a witness whose statement was recorded under Section 164, but the salient rule of caution must always be borne in mind."

Therefore, we have to consider and analyse the evidence of such eye-witnesses with great care and caution. Out of four eye-witnesses, viz., P.Ws.17, 18, 19 and 33, the statements under Section 164 of Cr.P.C. were recorded only from P.Ws.17 and 33. The fact remains that all the said eye-witnesses have completely turned hostile and they have given a total go-by to their earlier version. The learned trial Judge, in spite of the same, placed reliance on the 164 statements of P.Ws.17 and 33, viz., Exs.P.5 and 37.

17. As far as P.W.17 is concerned, the prosecution has not chosen to elicit any question in respect of his earlier statement recorded under Section 164 of Cr.P.C., during the course of its cross-examination after P.W.17 has treated hostile and merely the 164 statement of P.W.17, viz., Ex.P.5 was marked and during the course of the cross-examination by the defence, P.W.17 stated that he has given the said 164 statement recorded by the Magistrate only as per the instructions of the police. AS far as P.W.33 is concerned, the prosecution has not chosen to put any question at all in respect of his earlier statement given to the Magistrate recorded under Section 164 of Cr.P.C. under Ex.P.37. It is needless to say that the statement under Section 162 of Cr.P.C. as well as under Section 164 of Cr.P.C. can be used either to corroborate or to contradict in respect of their earlier version. Therefore, we have no hesitation to hold that the learned trial Judge has wrongly placed reliance on such statements for convicting the accused resulting in grave miscarriage of justice.

18. Now let us consider the evidentiary value of the confession of the co-accused, viz., the absconding accused Guru @ Gurunathan @ Sivagurunathan @ Mahesh recorded by the Judicial

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

Magistrate No.I, Chidambaram, P.W.38 under Ex.P.35.

19. It is relevant to refer the very provision of the Indian Evidence Act in respect of the confession of the co-accused. Section 30 of the Indian Evidence Act reads hereunder :

> "30. Consideration of proved confession affecting person making it and others jointly under trial for same offence : When more persons than one are being tried jointly for the same offence, and a confession made by one of such person affecting himself and some other of such persons is proved, the Court may take into consideration such confession as against such other person as well as against the person who makes such confession."

The reading of the above said provision makes it crystal clear that the confession of the co-accused may be considered against the other accused only if such co-accused has been tried jointly for the same offence.

20. The Hon'ble Supreme Court in Suresh Budharmal Kalani V. State of Maharashtra (AIR 1998 SC 3258) has categorically held as follows :

> "Under Section 30 of the Evidence Act a confession of an accused is relevant and admissible against a co-accused if both are jointly facing trial for the same offence. Since, admittedly, Dr.Bansal has been discharged from the case and would not be facing trial with Kalani his confession cannot be used against Kalani. The impugned order shows that the Designated Court was fully aware of the above legal position but, surprisingly enough, it still decided to rely upon the confession on the specious ground that the prosecution was not in any way precluded from examining Dr.Bansal as a witness in the trial for establishing the facts disclosed in his confession. This again, was a perverse approach of the Designated Court while dealing with the question of framing charges. At that stage the Court is required to confine its attention to only those materials collected during investigation which can be legally translated into evidence an not upon further evidence (dehors those materials) that the prosecution may, adduce in the trial, which would commence only after the charges are framed and the accused denies the charges. The Designated Court was, therefore, not at all justified in taking into consideration the confessional statement of Dr.Bansal for framing charges against Kalani."

In view of the above said settled principle of law laid down by the

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

Hon'ble Apex Court in the decision cited supra, as in this case also the prosecution entirely left with the single piece of evidence, viz., the confession of the absconding accused viz., Guru @ Gurunathan @ Sivagurunathan @ Mahesh under Ex.P.35 and such confession of the said absconding accused cannot be placed reliance against the present accused persons in this case as the said absconding accused Guru @ Gurunathan @ Sivagurunathan @ Mahesh was not jointly tried along with the accused persons in this case, we are of the considered view that the learned trial Judge has committed a serious error of law resulting in miscarriage of justice.

21. Therefore, for the reasons stated above, our inevitable conclusion is to the effect that the impugned judgment passed by the learned trial Judge is unsustainable and accordingly, the reference is answered in favour of the accused and the death sentence imposed on A-1 by the learned trial Judge is set aside and all these appeals are allowed and the conviction and sentence imposed on the appellants by the learned Additional Sessions Judge, Chidambaram, in S.C.No.323 of 2005 dated 29.06.2007 are set aside and the appellants are set at liberty forthwith, if their presence is not required in connection with any other case. Fine amount paid, if any, is directed to be refunded to the appellants.

Sd/-
Asst. Registrar.

/true copy/

Sub Asst. Registrar.

gg

To

1. The Additional District and Sessions Judge,
   (Fast Track Court No.I), Chidambaram, Cuddalore District.
(in duplicate for communication to the prisoner)

2. - do - thro' The Principal Sessions Judge, Cuddalore.

3. The Judicial Magistrate No.I, Chidambaram.

4. The Judicial Magistrate No.II, Chidambaram.

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

5. 3 & 4 - do - thro' The Chief Judicial Magistrate,
   Cuddalore.

6. The Superintendent, Central Prison, Cuddalore.

7. The Superintendent, Central Prison, Vellore.

8. The Inspector of Police,
   C-5, Police Station, Chennai.

9. The Inspector of Police,
   Chidambaram Nagar Police Station,
   Chidambaram.

10. The Director General of Police, Chennai.

11. The District Collector, Cuddalore District.

12. The Public Prosecutor, Madras High Court, Madras.

13. The Superintendent of Police
Chidambaram Town Police Station,
Chidambaram.

1 cc to mr.K.V. Sridharan, SR. 66761
1 cc to Mr.A. Sasidharan, SR. 66720
1 c to Mr.R. Sethuvarayar, SR. 66495

Referred Trial No.4 of 2007
Crl.Appeal Nos.626 of 2007,
657, 689 and 692 of 2007

KM (CO)
kk 22/11

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/